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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BARBARA HOM,

Plaintiff and Appellant,

v.

**CULINARY INSTITUTE OF
AMERICA,**

Defendant and Respondent.

A132499

**(Napa County
Super. Ct. No. 26-50562)**

Appellant Barbara Hom was terminated from her employment as the manager of the restaurant operated by respondent Culinary Institute of America (CIA) at its Greystone Campus. CIA advised Hom that her position was being eliminated due to a sharp decline in revenues. Hom filed suit for wrongful termination, alleging, among other things, that she had been fired in retaliation for complaints she made about safety conditions in the restaurant. Hom appeals from a summary judgment in favor of CIA. We affirm.

BACKGROUND

CIA is a nonprofit educational organization offering bachelor's and associate degree programs in the culinary arts. Its Greystone campus is located in St. Helena and includes the Wine Spectator Greystone Restaurant, which is run by a combination of students and professionals. Historically, the CIA has employed a restaurant manager during more prosperous times and has done without one when the economy was not doing as well. For example, the position was eliminated after a decline in business

attributable to the September 11, 2001 terrorist attacks. During such periods, the duties that would be performed by the restaurant manager are typically fulfilled by assistant managers and the food and beverage director.

CIA hired a restaurant manager in 2006 after operating without one for several years. That person resigned to move abroad in June 2007, and Hom was hired to fill the position. Several people were involved in the decision to hire Hom, including Charles Henning, the managing director of the Greystone Campus, Robert Graham, the director of administration and finance, and Kenn Madsen, the food and beverage director. Madsen was Hom's direct supervisor, and Henning was Madsen's direct supervisor.

As the restaurant manager, Hom was responsible for the "front of the house," where patrons were served. Her duties required her to oversee the restaurant's daily operations and make sure everything was clean and in working order. In January of 2008, she also assumed responsibility for group sales, which involved coordinating visits by parties of more than 14 diners. Hom supervised the five assistant managers and two supervisors who were working at the restaurant at that time.

Both Madsen and Henning considered Hom to be a good employee, and she received positive performance evaluations in November 2007, March 2008, and October 2008. But, in 2008, the restaurant's business began to decline as the national economy faltered. In early 2009, Henning and Graham decided to eliminate the restaurant manager position. Hom was terminated on April 8, 2009, and was told that her position was being eliminated due to a decline in business volume. CIA also eliminated a pastry sous chef position in the restaurant, as well as an assistant campus store manager position that was held by Suzanne Duquette.

After the restaurant manager position was eliminated, several other employees assumed the duties that Hom had performed. Among these employees was Ben Meek, a server who was promoted to assistant manager in October 2010, but who also continued to work shifts as a server. Suzanne Duquette was given a group sales position at a salary that was considerably lower than what Hom had been earning but was closer to what Duquette had been earning as an assistant campus store manager before that position was

eliminated. No restaurant manager has been hired since Hom was terminated, and the position of food and beverage director, held by Madsen, has also been eliminated.

Hom filed a civil complaint against CIA that included the following causes of action: (1) a statutory violation of Labor Code section 1102.5, subdivision (c); (2) a statutory violation of Labor Code section 6310; and (3) wrongful termination in violation of the public policies expressed in Labor Code sections 1102.5, subdivision (c) and 6310. As relevant here, the complaint alleged that Hom was wrongfully terminated in retaliation for complaints she had made about safety issues at the restaurant.¹

CIA moved for summary judgment, arguing that Hom's position had been eliminated for economic reasons, and not in retaliation for any protected activity by Hom. The evidence presented in support of the motion included a declaration by Robert Graham describing a decline in the restaurant's sales in 2008: "13. The number of the Restaurant's 'covers' – i.e., diners – began to decline in the fall of 2008. [¶] 14. As a direct result of the decline in covers, the Restaurant's overall revenue began to decline in the fall of 2008 as well. [¶] 15. In the fall of 2008, in an effort to avoid having to lay anyone off, the Greystone Campus' Managing Director, Charles Henning, and I implemented various cost-cutting measures, including working to increase revenue through marketing efforts, managing expenses, instituting a hiring freeze in the fall of 2008, and not filling positions when employees decided to leave. [¶] 16. In September 2008, the number of covers, as compared to the prior year, was down 25% and revenue had declined by 15%. [¶] 17. In October 2008, the number of covers, as compared to the prior year, was down 26% and revenue had declined by 16%. [¶] 18. In November 2008, the number of covers, as compared to the prior year, was down 27% and revenue had declined by 21%. [¶] 19. In December 2008, the number of covers, as

¹ The complaint also included causes of action based on age discrimination and the failure to offer reasonable accommodations for Hom's alleged disability. Hom does not argue on appeal that summary judgment was improper as to these causes of action, and we discuss them no further.

compared to the prior year, was down 38% and revenue had declined by 30%.

[¶] 20. The effect of the downward trend of covers and revenue was readily apparent when I compared the Restaurant's fiscal year-to-date sales to the previous year. (The CIA's fiscal year runs from June 1 to May 31.) In September of 2008, the Restaurant sales were \$122,146 below September of the prior year, in October of 2008, sales had fallen to \$233,007 below October of the prior year; in November of 2008, the Restaurant sales were \$332,854 below the prior year; by December they had dropped to \$455,396 below the December of the prior year; in January of 2009, the Restaurant sales were \$492,113 below the January of the prior year; as of February of 2009, sales had fallen to \$607,126 below the prior year; in March of 2009, the Restaurant sales were \$707,299 below the prior year; and by April of 2009, sales had dropped to \$828,482 below April of the prior year."

Graham's declaration continued, "21. Near the end of the 2008 calendar year, Henning and I identified the elimination of the Restaurant Manager position as a potential option for further cost-cutting. [¶] 22. The decision to eliminate the Restaurant Manager position was made on or before February 12, 2009, and no one other than Henning and I were involved in making that decision. [¶] 23. Shortly thereafter, Greystone also decided to eliminate a Pastry Sous Chef position, as well as an Assistant Campus Store Manager position. [¶] . . . [¶] 26. Henning and I chose to eliminate the Restaurant Manager position rather than Madsen's higher-paying Director of Food and Beverage position because our goal was to operate the Restaurant at the highest level of quality possible for the lowest cost possible, [] whereas Madsen had proven he was capable of managing multiple units at once (i.e., Food and Beverage Services, Special Events, and (on an interim basis) the Restaurant), [and]we did not believe Hom would succeed at taking on multiple units."

CIA also presented a declaration by Charles Henning, which provided in part: "14. In the months after Hom was hired, I became increasingly aware that the national economy was faltering, and recognized that the impact was being felt throughout the Napa Valley region, including at Greystone, and I factored this [into] the budget for the

2008/2009 fiscal year that would start June 1, 2008. [¶] . . . [¶] 16. Unfortunately, the blow to the Restaurant's business was more severe than anyone anticipated, and as a result the Restaurant's revenue fell far below the lowered expectations reflected in the 2008/09 budget. By the fall of 2008 the actual Gross Contribution Margin for the Restaurant was around \$280,000 below the previous fiscal year. [¶] . . . [¶] 19. Near the end of the 2008 calendar year, Graham and I identified the elimination of the Restaurant manager position as a potential option for further needed cost-cutting measures. [¶] . . . [¶] 22. In April 2009, the fiscal year-to-date covers at the Restaurant were 16,497 below the prior year's totals as of April 2008, and 17,740 below the totals as of April 2007, and 18,620 below the totals as of April 2006. [¶] 23. In April 2009, the fiscal year-to-date net direct contribution – i.e., the amount by which the Restaurant's revenue exceeded its 'direct' expenses – was \$316,293 (\$511,463 below the prior year), resulting in a direct contribution margin that was 4.3% less than budgeted, and 8.7% less than the fiscal year-to-date contribution margin as of April 2008. [¶] 24. In the nearly 21 months since the Restaurant manager position once filled by Ms. Hom was eliminated, no one has been hired to fill the Restaurant manager position in the Restaurant. [¶] 25. Since Hom's termination, no one has been hired to fill any Manager position at the Restaurant. Only recently, in October 2010, to have enough supervision to cover the restaurant operation following the departure of Kenn Madsen, was a server (Ben Meek) promoted to the position of Assistant Manager at the Restaurant.”

In her opposition to the motion for summary judgment, Hom attempted to show that she was terminated because she had raised a number of health and safety “complaints” during her tenure as restaurant manager. These “complaints” were made directly to Henning, Graham or Madsen at various times, as well as at monthly safety meetings attended by Henning, Graham, and Madsen. They consist of the following:

(1) Four refrigerators used to store beverages and dairy products at the coffee station were too warm, exceeding the maximum allowable temperature of 41 degrees Fahrenheit. Hom, along with several other employees, identified this as a recurring problem, and the issue was raised at the monthly safety meetings. Repairs were

attempted by Sodexho, the company that did the maintenance work for the restaurant, but Sodexho's head of maintenance told Hom the refrigerators should be replaced. The refrigerators were not replaced while Hom was there, although thermometers were placed inside to monitor the temperatures.

(2) Due to the problems with the refrigerators, the Restaurant had to store certain food items in tubs of ice to keep them cold, and some of the tubs leaked onto the floor. Hom told Madsen about the problem several times and put out yellow warning triangles and extra mats so the employees would not slip. When Henning asked Hom about the mats and triangles, she explained that they were using the tubs to keep food cold and Henning advised her to find some tubs that did not leak.

(3) One of the dishwashers used by the restaurant was not reaching the temperature required by state regulations (although the dishes were being sanitized through the use of chemicals). Hom noticed the problem in the late Fall of 2008 and told Madsen about it; the issue was resolved when CIA replaced the dishwasher in early 2009.

(4) Hom advised her supervisors about three major leaks in the restaurant--one in the restaurant's bar area that occurred when the culinary school kitchen upstairs was hosed down; one over some restaurant tables that was caused by condensation from an air conditioner running into light fixtures, causing them to "pop;" and a third from an upstairs bathroom onto an area in the restaurants where glasses were buffed. The leaks over the bar and from the bathroom upstairs were repaired by Sodexho; the leak over the restaurant tables was not fixed but was addressed by either not running the air conditioner or not seating customers at those tables.

(5) During the rains from November 2008 until January 2009, water came into the restaurant through ground floor vents. Hom told Madsen and suggested they build a small structure to block the vents. Hom built those structures herself and had them installed. She was not criticized for this solution.

(6) In the summer of 2008, a customer who hosted a large group at the restaurant reported that several of the guests had gotten sick after eating the hanger steak entrée. Hom thought the incident should be reported to the county health department, but

Madsen and the executive chef disagreed, so Hom did not make the call. Hom also told Henning that she thought they should call the health department, but he did not agree because there had been no complaints from other patrons, even though 289 steaks had been served, and there was no steak left from the batch that had been served which could be tested. Henning suggested that Hom send the party who complained a gift certificate.²

(7) In August 2008, Hom accompanied a county health inspector on an inspection of the restaurant. In a declaration filed in support of her opposition to the motion for summary judgment, Hom stated that when specifically asked about the dishwasher (which ran too cold) and the refrigerators (which ran too warm), she answered questions truthfully. The restaurant received a “B” rating rather than an “A” rating. Hom was not advised of the next inspection in December 2008, at which the restaurant received an “A” rating. Hom was not provided a copy of the August 2008 report so that she could take remedial action.

Based on this evidence, the trial court granted the motion for summary judgment. As to each cause of action based on retaliation, the court’s written order states, “[T]his cause of action fails as a matter of law because Plaintiff lacks evidence sufficient to state a *prima facie* case. In addition, Plaintiff lacks specific and substantial evidence sufficient to show that the legitimate nonretaliatory reasons articulated by Defendant for its actions were pretext for retaliation.”

² In her separate statement of undisputed facts in opposition to summary judgment, Hom notes that Henning thought it would be “ridiculous” to make a report to the health department. The evidence does not establish that Henning made such a statement to Hom when she suggested calling the health department; rather, Henning testified at his deposition that it would have been “ridiculous” to make the call when the number of people who got sick in the party that complained did not match the number who had been served the steak, and when CIA did not know what else the party might have been eating and drinking during the day.

DISCUSSION

I.

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 473c, subd. (c).) A defendant seeking summary judgment may meet this burden by establishing that a cause of action has no merit; i.e., that one or more elements of the cause of action cannot be established. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) We review an order granting summary judgment de novo, strictly scrutinizing the showing of the prevailing party. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832.)

The complaint in this case alleged that Hom was terminated because she complained to her supervisors and a health inspector about certain safety violations at the restaurant. It included three distinct causes of action based on this theory: (1) a statutory violation of Labor Code section 1102.5, subdivision (c), which provides, “An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation;” (2) a statutory violation of Labor Code section 6310, subdivision (b) of which states, “Any employee who is discharged . . . by his or her employer because the employee has made a bona fide oral or written complaint to . . . his or her employer, . . . of unsafe working conditions, or work practices, . . . shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer;” and (3) wrongful termination in violation of the public policies set forth in Labor Code sections 1102.5, subdivision (c) and 6310.

To establish retaliation under Labor Code section 1102.5 or 6310, an employee must demonstrate that (1) she engaged in protected activity; (2) she was subjected to an adverse employment action; and (3) there is a causal link between the two. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138 (*Mokler*); *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 451, overruled on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019.) An employer-

defendant in a retaliation case can satisfy its burden on summary judgment by showing that the plaintiff cannot establish a prima facie case of retaliation or that the employer had a legitimate, nonretaliatory reason for the adverse action. (*Mokler, supra*, at p. 138; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453; see also *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150.)

Here, CIA presented evidence showing that it decided to eliminate Hom's position as restaurant manager due to significant decreases in revenue. When an employer sets forth a nonretaliatory reason for its decision, the plaintiff-employee must produce specific and substantial evidence of pretext to withstand a motion for summary judgment. (*Mokler, supra*, at p. 138; *Akers, supra*, at p. 1453.) “ ‘[T]he plaintiff may establish pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” ’ ” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) “[A]n employer is entitled to summary judgment if, considering the employer’s innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer’s actual motive was [retaliatory].” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 361.)

The evidence presented by Hom did not support a rational inference that CIA’s decision to eliminate her position was based on retaliatory motives rather than financial reasons. Hom seeks to link the “complaints” she made about various safety issues at the restaurant with her termination, but her job duties *required* her to make sure the restaurant’s premises were clean and its appliances were functioning. There is no evidence that Hom ever received any negative feedback from her supervisors for raising the various issues about the premises and appliances (malfunctioning refrigerators and dishwasher, leaks and leaking ice buckets), and, indeed, she continued to be thought of as a good employee and to receive positive evaluations. The only hint that someone at CIA was less than pleased with Hom’s “complaints” was her deposition testimony that when she mentioned the refrigeration problem at safety meetings, Charles Henning said, “Let’s move on.” Such a remark is far too ambiguous to support a finding that Henning’s

decision to eliminate Hom's position was based on her comments about the refrigeration. As to the hanger steak incident, the evidence shows that while Hom recommended contacting the health department, her supervisors did not think it was necessary to do so and she simply complied with their instructions. Even if we assume that Hom's internal communications to other members of CIA as part of her job duties amounted to protected activity, Hom failed to establish any causal connection between those communications and the elimination of her position.

Hom relies in part on evidence that she accompanied a health inspector on a August 2008 inspection and answered his questions honestly, resulting in a B rating for the restaurant. Hom was never reproached for her comments during the inspection, which occurred eight months before her position was eliminated. Generally speaking, an employer's action must follow " 'within a relatively short time' " before a retaliatory motive will be inferred. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1110, fn. 6.) Hom notes that she did not accompany the health inspector on the subsequent inspection, at which time the restaurant received an A rating, but the evidence does not show that she was specifically excluded from the inspection. Rather, Kenn Madsen testified that he and other employees generally accompanied the inspectors and that Hom had "just happened to be there" on one occasion. Additionally, the evidence does not show that Hom's comments to the inspector actually led to the B rating. No inference can be drawn that Hom's participation in the August 2008 inspection led to her termination in April 2009.

Nor can Hom establish pretext from events that occurred after she was terminated. She notes that other employees assumed her duties after she left, but CIA never hired another restaurant manager to replace her. Although Eric Meek received a promotion to the position of assistant manager or supervisor in October 2010 (18 months after Hom was terminated), this position involved only a portion of the managerial duties and Meek continued to work shifts as a server, something Hom never did. Similarly, Suzanne Duquette was moved into the group sales position at a much lower salary than Hom had been earning, a position that was not offered to Hom because in Henning's experience,

demoting someone was never a good personnel strategy. The position of food and beverage director, held by Madsen, was eliminated and the number of assistant managers was cut after Hom left.

In short, our de novo review of the evidence leads us to the same conclusion reached by the trial court—that Hom failed to establish CIA’s stated reason for eliminating her position was pretextual. We need not consider the court’s alternative basis for granting summary judgment, namely, that Hom failed to present a prima facie case of retaliation.

II.

Code of Civil Procedure section 437c, subdivision (g) provides in relevant part, “Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists.” Hom argues that we should reverse the summary judgment because the trial court’s written order failed to state its reasons for the ruling and did not refer to the specific evidence on which it was based.

The trial court’s order did state the reasons for granting summary judgment: the lack of a prima facie case of retaliation and the lack of substantial evidence showing that CIA’s reasons for terminating Hom were pretextual. The order did not refer to specific items of evidence, but this does not mean reversal is required. We review the validity of the trial court’s ruling, not the reasons therefore, and a deficient statement of reasons presents no harm when the validity of a summary judgment has been established. (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448-449.) Given that our standard of review is de novo, any defect in the court’s statement of reasons has been rendered harmless by our conclusion that summary judgment was appropriate. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146.)

III.

Hom argues that the trial court erred when it allowed CIA to present, over Hom's objection, "an entirely new separate statement of undisputed facts in its reply only five days before the summary judgment hearing." We disagree.

Code of Civil Procedure section 437c, subdivision (b)(1) requires the party moving for summary judgment to "include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed."

Subdivision (b)(3) of that same statute provides, "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed." Under section 437c, subdivision (b)(4), the moving party may submit a reply up to five days before the hearing.

Though no provision is made in the statute for the filing of a supplemental separate statement in reply to the opposing party's separate statement, the court has the discretion to permit such a filing, along with supporting evidence, so long as the opposing party is given adequate notice and an opportunity to respond. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 313-316; *Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1098.) Here, the court did not abuse that discretion. The "reply separate statement" consists of the original separate statement of undisputed facts filed by CIA, Hom's response to each fact (i.e., whether the fact was disputed or undisputed), and commentary about why Hom's points lacked merit. These legal arguments could just as easily have been placed in the reply memorandum of points and authorities, which is clearly authorized by the summary judgment statute. (Code Civ. Proc., § 437c, subd. (b)(4).)

Hom complains that the "reply separate statement" contains evidentiary objections to Hom's evidence in opposition to CIA's separate statement. Any error in this respect was harmless because the court overruled both parties' evidentiary objections. Similarly,

we find harmless any error in allowing CIA to submit additional excerpts of deposition testimony by Charles Henning to rebut certain points in Hom's opposition, as we have not considered those materials in our de novo review of the motion.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent CIA.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.